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December 5, 2011

VIA ELECTRONIC DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: *Ex Parte* Notice
IB Docket No. 05-55; IB Docket No. 11-133

On December 1, 2011, Richard Feasey, Director of Public Policy, Vodafone Group ("Vodafone"); Ari Fitzgerald, counsel to Vodafone; and the undersigned, counsel to Vodafone; met with Rick Kaplan, Chief of the Commission's Wireless Telecommunications Bureau, and John Leibovitz, Paul Murray, Margaret Wiener, and Jeffrey Steinberg from the Wireless Telecommunications Bureau. On December 2, 2011, Mr. Feasey met with Mindel De La Torre, Chief of the Commission's International Bureau, and Kathryn O'Brien, Walt Strack, and Kiran Duwadi of the International Bureau. During each meeting, the Vodafone representatives discussed the attached analysis of the Commission's authority under Sections 310(b)(3) and (4) of the Communications Act of 1934, as well as general developments in Vodafone's other global markets.

Pursuant to Section 1.1206 of the Commission's rules, an electronic copy of this letter is being filed for inclusion in the above-referenced dockets.

Respectfully submitted,

/s/ Michele C. Farquhar

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cc: Mindel De La Torre
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THE FCC SHOULD MODIFY ITS REVIEW OF FOREIGN INVESTMENT IN WIRELESS LICENSEES TO BE CONSISTENT WITH THE COMMUNICATIONS ACT AND U.S. TRADE COMMITMENTS

SUMMARY

On August 9, 2011, the Federal Communications Commission began a comprehensive review of its policies for reviewing foreign investment in wireless licensees under Section 310 of the Communications Act.[1] The Commission declared:

> We seek to reduce to the extent possible the regulatory costs and burdens imposed on wireless common carrier and aeronautical applicants, licensees and spectrum lessees, provide greater transparency and more predictability with respect to the Commission's filing requirements and review process; and facilitate investment from new sources of capital, while continuing to protect important interests related to national security, law enforcement, foreign policy, and trade policy."[2]

Vodafone commends the Commission for beginning this proceeding, and fully supports its goals. The Commission can promote foreign capital investment in the United States, streamline its review process, and reduce paperwork burdens imposed by that process, while ensuring that the Government's national security, law enforcement and trade interests are fully protected. Vodafone plans to offer detailed proposals for reform in its comments in the proceeding.

One issue that stands in the way of achieving the Commission's announced goals, however, is the International Bureau's interpretation of the relationship between Sections 310(b)(3) and 310(b)(4). The Bureau's 2004 "Foreign Ownership Guidelines" ("IB Guidelines"), which were issued without affording the public an opportunity for comment, incorrectly apply Section 310(b)(3) to restrict some forms of indirect foreign investment,

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[1] *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio licenses under Section 310(b)(4) of the Communications Act of 1934, as amended, Notice of Proposed Rulemaking*, IB Docket No. 11-133, FCC 11-121, released August 9, 2011.

[2] *Id.* ¶ 1.

contrary to the statute – and illogically make it harder for a foreign company to hold a "non-controlling" indirect interest than a "controlling" indirect interest. Section I of this paper explains that the Bureau has interpreted Section 310(b)(3) in a way that conflicts with both the Act and U.S. trade commitments governing foreign ownership in wireless licensees, as embodied in the World Trade Organization Basic Telecommunications Agreement ("Basic Telecom Agreement").

Section II explains how Section 310(b)(4) can be read to encompass all levels and types of indirect investment that meet that provision's minimum level of foreign ownership. The Commission should confirm that all types of indirect foreign investment are governed by Section 310(b)(4), which permits indirect investment up to 100 percent subject to Commission review, not Section 310(b)(3), which limits direct investment to only 20 percent. By doing so the Commission will not only properly apply the Act but will also harmonize its approach with U.S. trade commitments.

Finally, it is important to note that application of the Section 310(b)(4) review process outlined herein would in no way compromise the current review of foreign ownership conducted by the Commission and Executive Branch. Nor would it preclude the imposition of appropriate commitments on the licensee designed to protect the Government's national security, law enforcement and trade-related interests.

I. SECTION 310(b)(3) OF THE ACT DOES NOT APPLY TO INDIRECT FOREIGN INVESTMENT.

The Commission reviews foreign investment in FCC common carrier and aeronautical radio station licensees[3] under Section 310 of the Act. Section 310(b) provides, in relevant part:

[3] For ease of reference, common carrier and aeronautical licenses will be referred to herein as "wireless" licenses. This term does not include licenses for broadcast licenses, which as explained below have been subject to different Commission policies.

> (b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by –
>
> . . . .
>
> (3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
>
> (4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign county, if the Commission finds that the public interest will be served by the refusal or revocation of such license.[4]

In 2004, the International Bureau issued the IB Guidelines to "assist the public and applicants in understanding and complying with the Commission's interpretation of Section 310 of the Act, its rules and foreign ownership policies as set forth in case law."[5] While principally discussing the application of Section 310(b)(4), one passage in the IB Guidelines states that Section 310(b)(3)'s 20 percent cap on foreign interests governs where relevant foreign interests "hold[] equity or voting interests in a licensee through an intervening domestically organized holding company that itself holds *non-controlling* interests in the licensee."[6] This statement is incorrect as a matter of law and policy for at least four reasons:

- The plain meaning of Section 310(b)(3) covers only <u>direct</u> foreign interests in common carrier radio licensees, not indirect interests.
- The legislative history of this provision underscores its plain meaning by demonstrating that Congress added Section 310(b)(4) to address <u>indirect</u> interests. Conversely, the IB

[4] 47 U.S.C. § 310(b)(3)-(4).

[5] *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licensees*, 19 FCC Rcd 22612 (IB 2004) (*"IB Guidelines"*), at 3. The IB Guidelines apply only to FCC common carrier and aeronautical radio licenses. *Id.* at 4.

[6] *Id.* at 6.

Guidelines turn Congressional intent on its head and lead to a nonsensical result by imposing more severe limits on non-controlling interests than on controlling interests.

- By imposing a 20 percent flat cap on some types of indirect ownership by entities organized in WTO Member nations, the IB Guidelines directly conflict with the United States' WTO Commitments. They effectively prevent some WTO investment above 20 percent, even though the U.S. Commitments state that indirect foreign ownership has "no limits."
- The IB Guidelines' sole rationale for applying Section 310(b)(3) to indirect minority ownership is a single 1985 case involving broadcast ownership. That case does not support, let alone compel, applying Section 310(b)(3) to indirect ownership, and is at odds with numerous other Commission decisions approving indirect minority interests under Section 310(b)(4).

Section 310(b)(4) of the Act – not Section 310(b)(3) – governs indirect foreign ownership interests. It applies to a licensee that is "directly or indirectly controlled by any other corporation of which more than one fourth of the capital stock is owned of record or voted by" foreign entities or individuals. The International Bureau is of the view that where indirect investment resides in an entity other than a "controlling" holding company, Section 310(b)(4) does not govern and thus that Section 310(b)(3) must. But one does not follow from the other. The fact that a statutory provision may not encompass a particular situation directly does not mean that by default a different provision must govern – particularly as here, where that other provision does not apply on its face. Section 310(b)(3) simply does not reach indirect ownership. In any event, Section 310(b)(4) can be interpreted to reach indirect minority foreign ownership, as discussed below in Section II.

A. The Plain Language of Section 310(b)(3) Does Not Apply to Indirect Foreign Investment.

By its plain language, Section 310(b)(3) applies only to a covered licensee whose equity is "owned" or "voted" by a foreign entity. Where equity in the licensee is held or voted by a *domestic* entity, the domestic entity (and not any alien) is the owner of record, and/or has the power to vote the equity. Because the Section 310(b)(3) terms "owned of record" and "voted by" are not ambiguous, the Commission may not interpret them in a manner that is contrary to their plain meaning. Historically, the Commission has applied the 20 percent restriction in Section 310(b)(3) to direct foreign investment only.[7] This is the correct interpretation of the provision's language. As the U.S. Supreme Court has held:

> As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. . . . The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.[8]

The second half of the Supreme Court's statutory analysis – determining that the statutory scheme is coherent and consistent under the plain meaning – is also fully satisfied. Section 310(b)(3) need not be stretched to address indirect interests in licensees held by foreigners through a domestic holding company because Section 310(b)(4) squarely does – by

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[7] *See, e.g., Bell Atlantic New Zealand Holdings, Inc., and Pacific Telecom Inc.*, 18 FCC Rcd 23140, 23150 n.70 (2003) (Section 310(b)(3) not triggered because the proposed transaction did not involve "direct foreign investment"); *Global Crossing Ltd. (Debtor-in-Possession), and GC Acquisition Limited*, 18 FCC Rcd 20301, 20318 n.81 (2003) (same); *Lockheed Martin Corporation et al.*, 17 FCC Rcd 27732, 27755 n.127 (2002) (same); *Glentel Corp.*, 17 FCC Rcd 12008, 12009 n.9 (2002) (applying Section 310(b)(3) to "direct ownership," while indicating that "[i]ndirect foreign ownership . . . is governed by section 310(b)(4) of the Act"); *Application of Fox Television Stations, Inc.*, 11 FCC Rcd 5714, 5728-29 ¶¶ 35-36 (1995).

[8] *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989)) (internal quotation marks omitted).

regulating "corporation[s] directly or indirectly controlled by any other corporation."[9] The Supreme Court has held that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[10]

B. The Legislative History of Section 310(b)(3) Confirms that It Does Not Reach Indirect Foreign Investment.

Even if the Commission could find the language of Section 310(b)(3) ambiguous, it still could not adopt the IB Guidelines' interpretation. The structure, purpose, and legislative history of Section 310(b)(3) make clear that it does not apply to indirect foreign interests.[11] The current Sections 310(b)(1)-(3) have their origin in Section 12 of the Radio Act, which Congress imported into the Act with only minor revisions.[12] Section 12 of the Radio Act comprised the then-existing limits on foreign ownership of common carrier radio licensees.[13] Because it believed that those limits "[did] not apply to holding companies," Congress added the current Section 310(b)(4) in the Communications Act to limit the amount of indirect interests that could be held by foreign entities.[14] And, instead of applying Section 310(b)(3)'s fixed 20 percent ownership cap to holding companies, Congress employed a 25 percent benchmark and made it

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[9] 47 U.S.C. § 310(b)(4). *See United States v. Locke*, 471 U.S. 84, 95–96 (1985) ("[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that the legislative purpose is expressed by the ordinary meaning of the words used. . . . *Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances.*") (*quoting Richards v. United States*, 369 U.S. 1, 9 (1962); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977)) (internal quotation marks omitted) (emphasis added).

[10] *Barnhart v. Sigmon Coal Co.*, 534 U.S. at 452 (*citing Russello v. United States*, 464 U.S. 16, 23 (1983); *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) (internal quotation marks omitted).

[11] *See Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (indicating that the "meaning of statutory language . . . depends on context," including Congress' purpose and the legislative history).

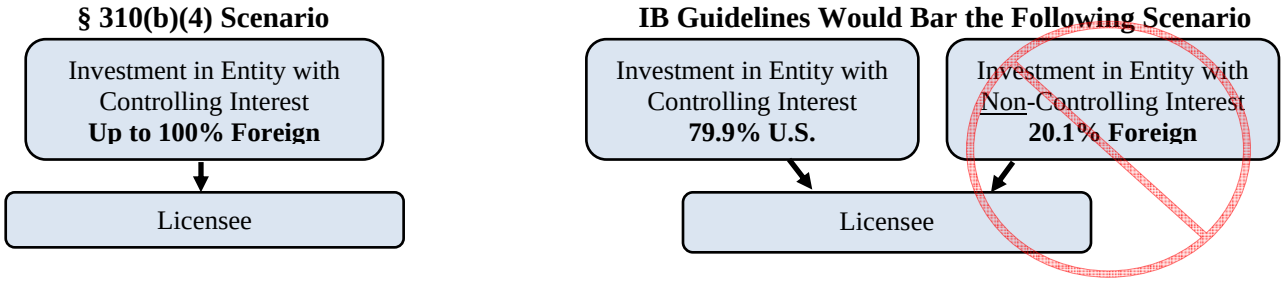
[12] *See* H.R. Rep. No. 1918, 73d Cong., 2d Sess., 48 (1934) ("*Conference Report*").

[13] *Id.*

[14] *Id.* at 48-49.

non-mandatory, giving the Commission the flexibility to determine whether indirect holdings in excess of 25 percent were contrary to the public interest.[15] This context makes clear that Section 310(b)(3) does not apply to indirect foreign interests, whether controlling or not. Congress expressly recognized that Section 310(b)(3) did not apply to indirect interests such as holding companies, and that is why it created Section 310(b)(4).

By contrast, the IB Guidelines' interpretation of Section 310(b)(3) would lead to absurd results, not a coherent and consistent statutory scheme: An indirect, non-controlling interest in a licensee by a foreign entity would be restricted to no more than 20 percent, while under Section 310(b)(4) an indirect, *controlling* interest (up to 100 percent) by the same foreign entity would be permitted with Commission approval.



There is no conceivable reason for Congress to have been more concerned about non-controlling, indirect foreign ownership than about controlling, indirect foreign ownership. It is an absurd result on its face, and is not a permissible interpretation.[16]

C. The IB Guidelines' Interpretation of Section 310(b)(3) Conflicts with U.S. Trade Policy and WTO Commitments.

By restricting non-controlling indirect foreign investment in a common carrier radio licensee unless it complies with Section 310(b)(3) – that is, by capping such investment at only

[15] *Id.*

[16] The "Court will not construe a statute in a manner that leads to absurd or futile results." *Nixon v. Missouri Municipal League*, 541 U.S. 125, 138 (2004) (*citing United States* v. *American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940)).

20 percent – the IB Guidelines flatly conflict with American trade policy toward foreign investment from companies organized under the laws of World Trade Organization Member nations.

In 1997, the United States' leadership was critical in achieving the WTO Basic Telecom Agreement, which included core principles, including open entry and foreign investment in telecommunications markets across the globe. As part of the United States' commitment to the trade pact, the U.S. government made unqualified and unambiguous commitments related to foreign investment in domestic companies that hold interests in common carrier radio licensees.[17] The U.S.'s 1997 WTO Commitments identify Section 310(a) and (b)(1)-(3) limits on market access for "Direct" foreign investment in common carrier licenses, but those commitments expressly declare there are *no* "Indirect" limits.[18] Indeed, under the United States' WTO commitments, indirect foreign investment in U.S. common carriers can be as high as 100 percent.

The IB Guidelines' view of Section 310(b)(3) – subjecting indirect, non-controlling foreign investment to a 20 percent flat bar – necessarily contravenes the U.S. commitment and constitutes a new barrier to foreign investment in the U.S. telecommunications market. As the illustration above demonstrates, a U.S. subsidiary of a WTO Member-based foreign company could not acquire more than a 20 percent but less than a 50 percent ownership interest in a U.S. common carrier licensee, because the IB Guidelines treat such interest as "non-controlling" and

[17] *See* United States of America Schedule of Specific Commitments, Schedule 2, General Agreement on Trade in Services, ¶ 2.C, supplementing pages 45-46 of document GATS/SC/90 (Apr. 11, 1997) (identifying limits on market access for direct foreign investments in common carrier licensees, without identifying any limitation for indirect foreign investments); *Fourth Protocol to the General Agreement on Trade in Services (WTO 1997)*, 36 I.L.M. 354, 366 (1997) (noting that, in response to the 1996 amendments to the Act, the United States "revised its offer to clarify that indirect foreign ownership was permitted, even though restrictions remained on direct foreign ownership"); *Foreign Participation Order*, 12 FCC Rcd 23902-04 ¶25-28.

[18] U.S. Schedule, Supp. 2, GATS, at ¶ 2.C. (Apr. 11, 1997).

thus subject to the 20 percent limit imposed by Section 310(b)(3). The proper analysis is to subject such interest to Section 310(b)(4), which permits ownership up to 100 percent – consistent with the "no Indirect limits" language of the U.S. WTO Commitments.[19]

The U.S. obligations under the WTO Basic Telecom Agreement can serve as the basis for the U.S. Government to review such indirect, non-controlling interests under the framework set forth in Section 310(b)(4). But they are violated by the IB Guidelines' interpretation of the Act.

D. The IB Guidelines' Reliance on *Wilner and Scheiner* Is Incorrect and Ignores Later Decisions Applying Section 310(b)(4) to Minority Interests.

Against this backdrop, the IB Guidelines engage in no statutory analysis to explain why Section 310(b)(3) should govern indirect, non-controlling foreign investment. Rather, they merely reference a single 1985 FCC decision, *Wilner and Scheiner*,[20] but that reference is misguided. *Wilner and Scheiner* was a 1985 declaratory ruling setting forth how limited partnership interests held by foreigners in a broadcast station should be regulated, and contained no statutory analysis construing the plain language of Section 310(b)(3).

First, *Wilner and Scheiner* addressed foreign ownership in broadcast stations only.[21] In particular, the Commission pointed to the insulation provisions under its broadcast ownership

[19] It is no answer to say that foreign investors could simply structure their indirect investments through a domestic "controlling" holding company. First, there is no requirement in the Act that investors adhere to particular structures for their investment – only that, if the indirect interest is deemed controlling, the Commission can deny it under Section 310(b)(4). Second, limiting the structure of investment vehicles would violate the "no limits" commitment the U.S. made in the WTO Basic Telecom Agreement. Third, there may be practical and business reasons why either the foreign investor or the U.S. licensee (or both) may not want to use a particular structure.

[20] *Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended*, Declaratory Ruling, 103 F.C.C.2d 511, 520-22 ¶¶ 16-20, n.45 (1985) ("*Wilner and Scheiner*"), *reconsidered in part*, 1 FCC Rcd 12 (1986).

[21] *See id*. at 516-17 ¶ 11 ("First, while the petitioner is correct in its assertion that one objective underlying the adoption of Section 310 is to preclude aliens from exercising actual control over broadcast facilities, this was not the sole purpose underlying the enactment of Section 310(b). Rather, Section 310(b) reflects the broader purpose of 'safeguard[ing] the United States from foreign influence' in the field of broadcasting. The specific citizenship requirements governing positional, ownership and voting

attribution rules, which are central to its media cross-ownership policies, as the reason for requiring such insulation – because without insulation a limited partner might take on the character of an officer or director.[22]

Second, *Wilner and Scheiner* addressed concerns about foreign interests in broadcast licensees held as limited partners for reasons largely related to the then-existing Section 310(b)(3) and (4) limits on foreign officers and directors. Those limits, however, were eliminated by the Telecommunications Act of 1996, removing this rationale.[23]

Third, the case contains no statutory analysis of Section 310(b)(3). The IB Guidelines reference the following discussion for the proposition that Section 310(b)(3) applies to non-controlling direct *and* indirect foreign ownership interests[24]:

> While the fact of domestic organization is necessary for citizenship status, by itself it is not sufficient to place an entity beyond the scope of the statutory limitations established *in Section 310(b)*. A contrary rule would enable aliens, by creating or shifting their interests to domestically organized businesses, to easily circumvent the clear intent of Congress to limit the level of influence of or ownership by aliens in broadcast licenses.[25]

The quoted statement makes reference only to Section 310(b) generally – not Section 310(b)(3) – even though it appears in a section of the decision with the heading, "Section 310(b)(3)." The passage does not state that Section 310(b)(3) applies to indirect as well as direct foreign

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interests reflect a deliberate judgment on the part of Congress as to the limitations necessary to prevent undue alien influence in broadcasting.") (footnotes omitted); *see also supra* text accompanying note 20.

[22] *Id.* at 520 ¶ 16 & n.43, 522 ¶ 20 & n.50.

[23] Telecommunications Act of 1996, Pub. L. 104–104, § 403(k)(1)-(2), 110 Stat. 131 (1996) ("1996 Act").

[24] *See IB Guidelines* at 6-7 (*citing Wilner and Scheiner*, 103 F.C.C.2d at 520-22).

[25] *Wilner and Scheiner*, 103 F.C.C.2d at 521 (emphasis added). The IB Guidelines also point to footnote 45 in *Wilner and Scheiner*, which states: "By its express language, the benchmarks established in Section 310(b)(4), rather than those contained in Section 310(b)(3), apply in situations in which an entity directly or indirectly controls the licensee. . . . As a consequence, the standards contained in Section 310(b)(3) are applicable only in situations in which an entity holds a non-controlling equity or voting interest." *Id*. at 521 n.45. Nothing in the language cited states that Section 310(b)(3) applies to *indirect, non*-controlling foreign ownership interests.

ownership interests in a license. Indeed, *Wilner and Scheiner* also states that "[t]here are differences in the alien ownership provisions contained in Section 310(b)(3), which apply to non-controlling interests directly in the licensee, and those of Section 310(b)(4), which apply to companies which directly or indirectly control the licensee,"[26] further underscoring that Section 310(b)(3) does not apply to indirect ownership interests. The proper interpretation of the quoted language is that Congress did not intend to allow foreign entities, through the creation of domestic holding companies, to evade entirely any foreign ownership review under Section 310(b). This, however, does not support the interpretation advanced by the IB Guidelines.

Fourth, Commission decisions subsequent to *Wilner and Scheiner* correctly distinguish indirect from direct foreign ownership and make clear that Section 310(b)(3) applies only to direct ownership. For example, in *General Electric Capital*, the Commission concluded, after extensive analysis of the legislative history and congressional policies underlying Sections 310(a) and 310(b) of the Act, that "Section 310(b)(4) was designed to address indirect ownership and control situations that were not covered by the prohibitions of Section 310(a) or 310(b)(1)-(3)."[27] The Commission also approved Vodafone's indirect, non-controlling investment in Verizon Wireless under Section 310(b)(4).[28] Similarly, the Commission approved Deutsche Telekom AG's indirect, non-controlling interests in certain licensees, including several Cook Inlet entities and Wireless Alliance, L.L.C., under Section 310(b)(4).[29]

[26] *Id*. at 524 (emphasis added).

[27] *General Electric Capital*, 16 FCC Rcd 17575, 17585-86 ¶ 22 (2001).

[28] *See Vodafone AirTouch, PLC and Bell Atlantic Corp.*, 15 FCC Rcd 16507, 16513-14 ¶ 16 (2000).

[29] *See VoiceStream Wireless Corp. et al.*, 16 FCC Rcd 9779, 9846-48 ¶¶ 129-34 (2001) ("*DT-VoiceStream Order*").

In any event, the Commission is not bound by the rationale of *Wilner and Scheiner* as adopted by the International Bureau,[30] and should therefore take this opportunity to revisit the IB Guidelines' misplaced reliance on the case by revising the treatment of indirect, non-controlling foreign investment to comport with the Act.

II. SECTION 310(B)(4) APPLIES TO INDIRECT FOREIGN INVESTMENT.

The proper reading of the statute is that only Section 310(b)(4) – not Section 310(b)(3) – addresses indirect foreign ownership. As the Commission stated in the *Deutsche Telekom-VoiceStream* decision, the legislative evolution of Section 310(b) "indicates that the categories of restrictions developed over time to reach situations where the foreign connection was progressively less direct and imposed restrictions that were progressively less absolute."[31]

Moreover, Section 310(b)(4) can be read to address all indirect foreign ownership above 25 percent. Congress did not define the term "controlled" in Section 310(b)(4), and the Commission has repeatedly held that "control" is a fact-specific analysis that can, for example, determine that minority equity ownership constitutes control. In fact, in the case of general partnership interests, the Commission generally treats even a one percent equity interest as "controlling." Moreover, the legislative history of Section 310(b)(4) – including language from the Senate, House and Conference Reports as well as an Administration memorandum – reveals that Congress was concerned not merely about de jure "control" but about the ability of a foreign entity to exert <u>influence</u> over the licensee – again, a fact-specific analysis not necessarily dependent on majority ownership or de jure control.

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[30] *See, e.g., Applications of ComEx, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 3370, 3372 ¶ 14 (1991) ("[T]he Commission is not bound by Bureau precedent.") (*citing Amor Family Broadcasting Group*, 918 F.2d 960, 962 (D.C. Cir. 1990)).

[31] *DT-VoiceStream Order*, 16 FCC Rcd at 9801 ¶ 35. Indeed, the structure of Section 310(b) is intended to tolerate "larger amounts of nominal alien ownership . . . as the alien's connection with the license holder becomes more remote." J. Watkins, *Alien Ownership and the Communications Act*, 33 Fed. Comm. L. J. 1, 3 (1981).

The Commission can thus interpret Section 310(b)(4) as empowering it to require licensees to submit information whenever indirect foreign ownership in a covered licensee would exceed 25 percent, so that it can conduct the assessment required by that provision. When it determines that the amount and type of the indirect foreign investment, the legal form of the holding entity, the role of that investor in the licensee's board of directors or management, or other facts indicate that the licensee would be indirectly "controlled" by that foreign investor, it can make its public interest determination under Section 310(b)(4) and disallow the interest when warranted. It can act consistently with the United States' WTO Commitments by continuing its practice of finding that indirect foreign ownership of up to 100 percent by an investor from a WTO Member nation is presumptively in the public interest. And, it can continue its practice of referring proposed investments to the federal agencies that conduct national security, law enforcement and trade policy reviews under independent statutory authority. In this way, the Commission can fully safeguard all of the national security, trade policy and other factors that it has in the past applied to reviewing indirect foreign ownership.

A. Commission Precedent Permits the Commission to Review Indirect Foreign Interests Even Where No *De Jure* Control Exists.

Section 310(b)(4) authorizes the Commission to decline to issue a common carrier radio license to "any corporation *directly or indirectly controlled* by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens" (emphasis added). To discharge its duty under this provision, the Commission must determine whether the licensee is in fact "controlled" by an entity that in turn has greater than 25 percent foreign ownership. However, neither Section 310(b) nor other provisions of the Act define what constitutes "control." While "control" can be *de jure* – i.e., majority equity ownership or "voting" control – it can also be *de facto* – when an owner has enough interest in a company to wield actual control. Moreover, Commission precedent and the legislative history of Section

310(b)(4) make clear that the Commission can review under that provision situations where a foreign investor may not hold majority voting control but exercises significant influence over the affairs of the licensee.[32] It can thus continue to fully safeguard the national security, law enforcement and other Government interests that may be affected by indirect ownership interests in a U.S. licensee.

The Commission in other contexts has interpreted the term "control" flexibly and in some cases as synonymous with "influence." For example:

- In enforcing its duty to review and approve transfers of control of licensees, the Commission has used varying standards to define "control," including the *Intermountain Microwave* standard,[33] which focuses on a party's ability to direct a licensee's operations; the designated entity *de facto* control standard for spectrum auction bidding credit applicants, 47 C.F.R. § 1.2110; and the *de facto* control standard used to determine the party in charge of spectrum usage under the Commission's spectrum leasing rules, 47 C.F.R. § 1.9010. Each of these tests examines the scope of the entity's ability to affect the licensee's business and operations.
- It has also repeatedly treated general partnership interests, regardless of the amount of equity the general partner holds, as "controlling" interests, meaning that minority partnership interests are deemed "controlling."[34] It has based that position on general

[32] *See Rochester Telephone Corporation v. United States*, 307 U.S. 125, 145-46 (1939) (holding "Congress did not imply artificial tests of control" under section 2(b) of the Act, which denies the Commission jurisdiction over any carrier "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier," and concluding that control "is an issue of fact to be determined by the special circumstances of each case").

[33] *Intermountain Microwave,* Public Notice, 12 FCC 2d 559 (1963).

[34] *See BCP CommNet, L.P., Transferor, and Vodafone Airtouch PLC., Transferee, For Consent to Transfer Control of Licenses,* Memorandum Opinion and Order, 15 FCC Rcd 28, 30 (WTB 1999), *ord. on further recon. denied,* 17 FCC Rcd 10998 (WTB 2002), *ord. on further recon. dismissed,* 18 FCC Rcd 8161 (WTB 2003) ("CommNet's interest in each of the relevant licensees involves a general partnership

partnership law which, absent contrary provisions in the partnership agreement, enables each partner to influence the partnership's business by, for example, binding the partnership into contractual commitments.

- And, under the Commission's broadcast attribution standards, holders of voting equity in a broadcast licensee in amounts as low as five percent are treated as though they are the owners or parties in control of the broadcast licensee for purposes of the Commission's multiple broadcast ownership and cross-ownership restrictions.[35]

All of these standards of "control" vary, depending on their context, suggesting that the Commission has similar flexibility to interpret the term "control" in the context of indirect foreign ownership under Section 310(b)(4) as well. In none of these situations has the Commission limited its review to *de jure* control. Moreover, as noted in Section I, Commission decisions have found that Section 310(b)(4) exclusively governs indirect foreign interests.[36]

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interest, which the Commission considers to be a controlling interest.") ("*BCP CommNet*"); *Global Crossing Ltd. And Frontier Corporation, Applications for Transfer of Control Pursuant to Sections 214 and 310(d) of the Communications Act, as amended*, Memorandum Opinion and Order, 14 FCC Rcd 15911, 15915 ¶9 (WTB/IB/CCB 1999) ("As a general partner in UCN, Frontier holds a controlling interest by definition.") (citation omitted).

[35] *See* 47 C.F.R § 73.3555 (Note 2a) (indicating that "partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee . . . will be cognizable"); (Note 1) (defining "cognizable interest" as "any interest . . . that allows a person or entity to own, operate or control, or that otherwise provides an attributable interest in, a broadcast station"); *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, Report and Order, 97 FCC 2d 997 (1984), reconsidered in part, 58 RR 2d 604 (1985), further reconsidered in part, 1 FCC Rcd 802 (1986) ("[A] 5% benchmark is likely to identify nearly all shareholders possessed of a realistic potential for influencing or controlling the licensee, with a minimum of surplus attribution.").

[36] *See, e.g.*, *General Electric Capital*, 16 FCC Rcd 17575, 17585-86 ¶ 22 (2001) ("Section 310(b)(4) was designed to address indirect ownership and control situations that were not covered by the prohibitions of Section 310(a) or 310(b)(1)-(3).)"; *AirTouch, PLC and Bell Atlantic Corp.*, 15 FCC Rcd 16507, 16513-14 ¶ 16 (2000) (approving non-controlling indirect interests under Section 310(d)(4); *DT-VoiceStream Order*, 16 FCC Rcd at 9846-48 ¶¶ 129-34 (accord).

B. Section 310(b)(4)'s Legislative History Also Permits the Commission to Review Indirect Foreign Interests.

As the D.C. Circuit has observed, the "meaning of statutory language . . . depends on context," including Congress' purpose and the legislative history.[37] The legislative history of Section 310(b)(4) also supports a fact-based evaluation to determine when indirect foreign investment constitutes "control."[38] As noted above, Congress added Section 310(b)(4) to the then-existing foreign ownership limitations contained in Section 12 of the Radio Act with the express purpose of addressing indirect foreign interests held through U.S.-organized holding companies,[39] which it believed the then-existing foreign ownership provisions of the Radio Act (including the precursor to Section 310(b)(3)) did not address.[40] This interpretation conforms to the structure of Section 310(b), which tolerates "larger amounts of nominal alien ownership . . . as the alien's connection with the license holder becomes more remote."[41]

Moreover, the legislative history indicates that Congress's primary goal in enacting Section 310(b)(4) was to empower the Commission to regulate broadly indirect foreign influence over covered FCC licensees wielded through domestically organized holding companies, and not merely when such indirect foreign influence rises to the level of a majority voting interest. When the Conference Committee convened to resolve inconsistencies between the House and Senate versions of the legislation that ultimately enacted Section 310(b)(4), it substantially

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[37] *Bell Atlantic*, 131 F.3d at 1047.

[38] The Commission should use all the "traditional tools of statutory interpretation," including "text, structure, purpose, and legislative history," to ascertain Congress's intent. *Pharmaceutical Research & Manufacturers of America v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001).

[39] *Conference Report* at 48-49. *See also DT-VoiceStream Order*, 16 FCC Rcd 9779 ¶ 40 (noting that one purpose of adding 310(b)(4) was to address indirect ownership and control) (citing H.R. Rep. No. 1918, 73d Cong., 2d Sess. 48 (1934)). *See also Bell Atlantic*, 131 F.3d at 1047 (indicating that the "meaning of statutory language . . . depends on context," including Congress' purpose and the legislative history).

[40] *Conference Report* at 48-49.

[41] John J. Watkins, *Alien Ownership and the Communications Act*, 33 Fed. Comm. L. J. 1, 3 (1981).

adopted the Senate's version.[42] In its Report, the Senate stated that the purpose of its language was "to insure the American character of holding companies whose subsidiaries operate under radio licenses granted by the Commission," while still allowing some level of alien representation.[43] Elsewhere in its discussion, the Senate referred to indirect "foreign ownership," "alien representation," and foreign "interests," suggesting that its concern related broadly to indirect foreign influence over covered licensees, as opposed merely to majority or voting control.[44] Application of Section 310(b)(4) to all situations in which foreign investment of 25 percent or greater is made in a covered FCC licensee indirectly through a domestically organized holding company is consistent with that goal.

A memorandum from the Secretary of Commerce to the President of the United States, which was transmitted to the Senate, underscores this concern. The Secretary addressed what he termed a "loophole" in Section 12 of the Radio Act – *i.e.*, Sections 310(b)(1)-(3):

> In 1927 when the Radio Act was made law, Congress was alive to this possibility and went to great length in section 12 of that act to prevent *foreign influence* from entering our communication system. They were unsuccessful, to some extent, as a loophole in the law permits a foreign-dominated holding company to own United States communication companies. This flaw in the law has already been utilized for that very purpose, and . . . one member [of the committee] strongly advises that now is the time to remedy the defect. . . . To this end, that member of the committee believes the provisions of section 12 of the Radio Act of 1927 should be amended and strengthened in order that the intent of the provisions of this section may not be evaded by setting up holding companies with foreign directors or *influenced by foreign stockholders*, which holding companies now may control United States communication

[42] *Conference Report* at 49 (adopting the Senate version and adding additional authority for the FCC to reject an indirect foreign interest greater than 25% if it would not serve the public interest).

[43] S. Rep. No. 781, 73d Cong., 2d Sess., 7 (1934) ("*Senate Report*") ("To prohibit a holding company from having any alien representation or ownership whatsoever would probably seriously handicap the operation of those organizations that carry on international communications and have large interests in foreign countries in connection with their international communications."). The Senate also expanded the indirect foreign ownership cap from the previously proposed limit of 20% to 25%. *Id.*

[44] *Id*.

> companies under the provision of this section, although not so intended by the framers of the law.[45]

Nowhere did the Senate suggest that its use of the phrase "controlled by" in Section 310(b)(4) was meant to limit application of the section solely to situations where U.S. holding companies with foreign ownership wield majority or voting control over covered licensees.

Context for the Senate's use of the phrase "controlled by" in Section 310(b)(4) is also revealed by the House Report, which was released several months after the Senate Report and a few days before the Conference Committee Report.[46] The House noted that the Senate rejected specific definitions "of the terms 'parent,' 'subsidiary,' and 'affiliated' for the purposes of those provisions of the bill which applied to parents and subsidiaries of common carriers subject to the [A]ct and persons affiliated with such carriers."[47] Instead, the Senate referred to those interests generally as "controlling," an approach the House Report endorsed, reasoning that the term "controlling" was preferable to attempting to cover those interests with specific definitions, as "[m]any difficulties are involved in attempting to define such terms."[48] Making clear its intent for the term "controlling" to have a broad meaning, the House explained:

> No attempt is made to define 'control', since it is difficult to do this without limiting the meaning of the term in an unfortunate manner. Where reference is made to control the intention is to include actual control as well as what has been called legally enforceable control. It would be difficult, if not impossible, to enumerate or to anticipate the many ways in which actual control may be exerted. A few examples of the methods used are stock ownership, leasing, contract, and agency. It is well known that

[45] Letter from the President of the United States to the Chairman of the Committee on Interstate Commerce transmitting a Memorandum from the Secretary of Commerce Relative to a Study of Communications by an Interdepartmental Committee, S. Comm. Print, 73d Cong. 2d Sess. 6 (1934) (emphasis added).

[46] The Senate Report was released on April 17, 1934, the House Report was released on June 1, 1934, and the Committee Report was released on June 4, 1934.

[47] H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934) ("*House Report*") (definitions of these terms were initially included in the House version of the Act, H.R. 8301).

[48] *Id*. at 4-5.

> actual control could be exerted though ownership of a *small percentage* of the voting stock of a corporation, either by the ownership of such stock alone or through such ownership in combination with other factors.[49]

The House thus declined to adopt a definition of control that could limit its meaning.

The Conference Report underscores the broad interpretation of control. It describes Section 12 of the Radio Act, which as noted above is now reflected in Section 310(b)(1)-(3) of the Act, as restricting "alien control" of radio station licenses – even though those subsections deal with direct ownership restrictions, including the 20 percent cap on foreign interests:

> Section 12 of the Radio Act restricting alien control of radio-station licenses does not apply to holding companies. The Senate bill, adapted from H.R. 7716, provides that such licenses might not be granted to or held by any corporation controlled by another corporation of which any officer or more than one-fourth of the directors are aliens or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, a foreign government, or a corporation organized under the laws of a foreign country. The substitute (sec. 310(a)(5)) adopts the Senate provision with an addition stating that the license may not be granted to or held by such a corporation if the Commission finds that the public interest will be served by the refusal or the revocation of such license.[50]

The Conference Report's use of the term "control" to cover the 20 percent ownership ban indicates that Congress viewed "control" for Section 310(b) purposes as something that could involve far less than actual majority voting control and reflected instead foreign influence.[51]

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[49] *Id*. (emphasis added).

[50] *Conference Report* at 48-49.

[51] The fact that Congress used the term "control" broadly in Section 310(b) does not mean that the term must be read that way in all contexts of the Act or even Section 310. The courts and the Commission have repeatedly emphasized that a single term may be accorded different meanings when used in different provisions of the same statute. *See, e.g., Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574-76 (2006) ("A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies": "There is … no 'effectively irrebuttable' presumption that the same defined term in different provisions of the same statute must 'be interpreted identically.' Context counts."); *see also Abbott Laboratories v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990); *Amending the Definition of Interconnected VoIP Service*, Notice of Proposed Rulemaking, FCC 11-107, at ¶ 101 n.225 (Jul. 13, 2011).

The Commission has acknowledged this legislative history. In *Wilner and Scheiner*, the Commission observed that precluding "aliens from exercising actual control" over FCC licensees "was not the sole purpose underlying the enactment of Section 310(b)."[52] It noted that "[s]ection 310(b) reflects the broader purpose of safeguarding the United States from foreign influence" and "[t]he specific citizenship requirements governing positional, ownership and voting interests reflect a deliberate judgment on the part of Congress as to the limitations necessary to prevent undue alien influence."[53] Congress's deliberate judgment did not leave an obvious loophole that would permit indirect minority foreign investment to escape the reach of Section 310(b)(4). After all, Congress added that provision for the express purpose of addressing a similar loophole that existed in the Radio Act.[54]

Therefore, Section 310(b)(4) allows the Commission to review indirect foreign interests, as Congress appears to have intended "control" to be synonymous with "influence" and rejected attempts to define control by reference to any specific corporate structures, level of stock ownership, or percentage of voting rights.[55] Even if the Commission were to conclude that Section 310(b)(4) does not clearly authorize regulation of indirect minority foreign interests, the statute is at least ambiguous. As discussed, Congress deliberately declined to define the term "control" for fear of limiting its meaning. Indeed, in the corporate context, "control" can refer to majority ownership and voting control, but also can (and often does) refer to ownership sufficient, on the facts presented, to give the holder influence.

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[52] *Wilner and Scheiner* at 517 ¶ 11.

[53] *Id.*

[54] *See Alarm Industry Communications v. FCC*, 131 F.3d 1066, 1071 (1997) (rejecting distinctions drawn by the Commission that were "not tied to anything remotely related to the evident objective" of the statute).

[55] *See Bell Atlantic*, 131 F.3d at 1047 (indicating that the "meaning of statutory language . . . depends on context," including Congress' purpose and the legislative history).

This approach is consistent with the purpose of Section 310(b)(4): to close a loophole in the then-existing foreign ownership provisions of the Radio Act that permitted unlimited and unchecked indirect foreign interests in FCC licensees held through U.S.-organized holding companies. It also conforms to the structure of Section 310(b), which tolerates greater amounts of foreign interests as the alien's connection with the license holder becomes more remote. Finally, the fact that the legislative history uniformly suggests that Congress intended Section 310(b)(4) to apply to significant foreign investment in a covered FCC licensee held through a domestic entity, and not just to majority control calculated as a percentage of shares, confirms that the FCC's adoption of such an approach would be reasonable.

C. Section 303(r) Supports Application of Section 310(b)(4), Not Section 310(b)(3), to Indirect Foreign Interests.

In relevant part, Section 303(r) directs the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out . . . any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."[56] The Commission has recognized that this provision affords it with both the authority and the obligation to ensure consistency between its regulations and the nation's treaty obligations.[57] Here, Section 303(r) underscores the need to review minority indirect foreign investments under Section 310(b)(4), because in permitting such interests from investors from WTO Members up to 100 percent, the

[56] 47 U.S.C. § 303(r).

[57] *See, e.g.*, *Modification of Licenses held by Iridium Constellation, LLC and Iridium, US LP*, 18 FCC Rcd 20023, 20028 ¶ 12 (IB 2003) ("[T]he Communications Act provides the Commission greater discretion where international radio-frequency issues, particularly those involving treaty obligations, are involved."); *AT&T Corp.*, 14 FCC Rcd 8306, 8313-15 ¶¶ 16-22 (1999) (evaluating Bureau's order for consistency with international obligations); *Amendment of Part 83 to Provide for an Auxiliary Source of Electrical Energy on Certain U.S. Vessels Subject to the Great Lakes Agreement*, 28 F.C.C.2d 121 (1971) (relying on Section 303(r) to support adoption of requirement to further treaty obligation).

Commission would fulfill the U.S. Commitments to the Basic Telecom Agreement. Conversely, applying Section 310(b)(3)'s absolute 20 percent cap to such interests would undermine those U.S. Commitments, because it would severely restrict such minority indirect investments. The Commission can best harmonize these two statutory provisions by reviewing all indirect foreign ownership interests under the more flexible language of Section 310(b)(4).[58] This approach would still ensure that the Commission has the latitude to deny a proposed indirect foreign investment in a wireless licensee in excess of 25 percent where such action would not be consistent with the public interest – and ensure that the U.S. meets its WTO commitments related to foreign investment in domestic licensees.

D. Federal Agency Review of National Security, Trade Policy and Related Matters Would Be Preserved If Section 310(b)(4) Is Interpreted to Address Indirect Foreign Ownership.

Nothing in the Commission's review of indirect foreign investments under Section 310(b)(4) would compromise the ability of the Commission or any agency within the Executive Branch to carry out its duty to assess, regulate or restrict foreign investment.[59] Any such process would be triggered regardless of the regulatory framework employed by the Commission, and subject to the laws and regulations of the applicable agency. Commission review would be triggered whenever the aggregate amount of foreign indirect investment in a covered licensee

[58] It is a basic rule of statutory construction that each section of a statute is to be "construed in connection with every other part or section so as to produce a harmonious whole." 2A Norman J. Singer, Sutherland Statutory Construction § 46.05 at 103 (5th ed. Clark Boardman Callaghan 1993) (Supp. 1996); *see also FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000) (A court must "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole."); *Smith v. United States*, 508 U.S. 223, 124 L. Ed. 2d 138, 113 S. Ct. 2050, 2056 (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute.").

[59] Some Executive Branch agencies have independent interests in reviewing foreign investment in wireless licenses for national security, law enforcement, foreign policy and trade concerns. *See, e.g*., *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order on Reconsideration, 12 FCC Rcd 23891, 23894 ¶ 4, 23911 ¶ 46, 23913-14 ¶¶ 50-51, 23919 ¶¶ 61-62 (1997) ("*Foreign Participation Order*"); *DT-VoiceStream Order*, 16 FCC Rcd at 9815-23 ¶¶ 60-77.

exceeded 25 percent. Because the licensee would thus be required to inform the Commission of any such foreign ownership interest, the Commission would have a vehicle for referring information about the investment to all of the appropriate agencies. As the Commission has previously stated, "[t]he Executive Branch's input would continue to be important in [its] consideration of the overall public interest."[60]

Moreover, the Commission's reliance on Section 310(b)(4) in reviewing indirect foreign investment would not prevent the Commission from imposing on the covered licensee obligations designed to protect the Government's national security, law enforcement, and trade-related interests. Should the Executive Branch negotiate an agreement with the licensee governing its operations, the Commission can, consistent with current practice, require the licensee to accept that agreement as a condition on its license.[61]

[60] *Market Entry and Regulation of Foreign-Affiliated Entities,* Report and Order, 11 FCC Rcd 3873, 3897 ¶ 62 (1995).

[61] *See, e.g., Vodafone AirTouch Plc and Bell Atlantic Corp.,* 15 FCC Rcd. 16507, 16520-21 (2000) (affording "deference to Executive Branch expertise on national security and law enforcement issues" and conditioning Section 310(d) consent to license transfers on parties' agreement with the Department of Defense, Department of Justice and the FBI).